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ABSTRACT

Since collective bargaining in public education is here to stay, boards of education should learn to accept it for what it is--an adversary process. The author contends that striking is not a very viable weapon in the arsenal of the teachers' union because the schools will continue to operate, and public pressure against prolonged strikes and unreasonable settlements will increase, especially in states that adopt sunshine laws and fishbowl bargaining. The author advocates the mediation and fact-finding process instead of binding interest arbitration in the event of negotiation impasse. He objects to compulsory arbitration because it would become an accepted final step in the bargaining process--a step in which the union takes little risk and the school board plays Russian roulette. (Author/DS)

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NATIONAL SCHOOL BOARDS ASSOCIATION MEETING

Presentation by Robert Y. Dubel

"Mediation, Fact-finding, and Impasse"

Clinic D-48

A discussion of mediation, fact-finding, and arbitration assumes that a process of collective bargaining exists in a school district and that negotiating teams for a school board and a teachers' organization may fail at times to reach agreement -- thus reaching an impasse.

While it is not within the realm of our responsibility in this clinic to express opinions as to the desirability or inevitability of the collective bargaining process in our school systems, it is important to note that this is a relatively new phenomenon which started in a substantive way in New York City in 1962 and did not impact heavily on the American public school scene until the late 1960's. (I am aware of the fact that researchers trace the beginning of collective bargaining to Norwalk, Connecticut in 1946, but the process lay dormant until the 1960's.)

With or without the benefit of statute, some school systems in most states have experienced widely varying degrees of collective bargaining. The majority of American teachers is covered today by collective bargaining agreements or contracts.

EA 009 449

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SPEAKER Dubel CLINIC NO. D48 PROGRAM p.39

Yet, I still hear colleagues wistfully express the hope that we can go back to the "good ol' days" when we were one big happy educational family, when the NEA symbolized this togetherness by regularly alternating a superintendent of schools and a classroom teacher as president. In the words of Thomas Wolfe: "We can't go home." Most of us must realistically accept collective bargaining in public education as a way of life; learn to live with it; and help to shape it so that it continuously becomes a more positive process. This shaping, hopefully, will be done state by state without the mandate of a Federal statute. A recent Supreme Court decision makes the prospect of imposition of a Federal collective bargaining law on public school systems much more unlikely than was true a year ago.

It is impossible to discuss intelligently the nuts and bolts of impasse resolution -- mediation, fact-finding, and arbitration -- without considering in depth the adversary nature of the collective bargaining process. And have no illusions -- it is an adversary process that we are discussing! Also, it is of little value to study the options of impasse resolution -- mediation, fact-finding, and arbitration -- without an understanding of the role of the "strike" in collective bargaining in public education.

In discussing the strike as a potential occurence in the bargaining process in a public school system, it is important that we examine the basic and inherent differences between private and public sector collective bargaining. Fortunately, as collective bargaining has spread through our school systems, we have not adapted private sector practices lock, stock, and barrel. We have not been forced to do so because school systems do not come under the jurisdiction of the National Labor Relations Board, and, of course, are not affected by decisions of that body which have

taken on a pro-union hue through most of the 40 years of activity by the NLRB.

In my opinion, the fundamental difference between private sector bargaining and public sector bargaining is found in the power bases from which the management bargaining team and the employee organization bargaining team operate. The nature of power bases in the private and public sectors are so different that this affects the whole character of the process. In the private sector the employer and the union both come to the bargaining table with potentially unlimited power or clout. Theoretically, the company has the ultimate power to say "no" to all union demands. Theoretically, the union has the ultimate power to put the company out of business by withholding the services of the work force. It is not very often that this type of power can be, or is, exercised, and the result more likely is productive collective bargaining. The union can only push so hard, or it causes the ultimate defeat -- the permanent loss of jobs for its members because the company is out of business. The company can only go so far in granting union demands, or it becomes non-competitive because of production costs, and it must then relocate or go out of business. Both the union and the company will naturally avoid these extremes and as they do bargaining will occur.

A school board and the recognized association (or union -- as the case may be) also operate from power bases, but these are power bases which are entirely different from those which I have sketched and oversimplified a few minutes ago for the private sector. We must never lose sight of the fundamental difference between private sector and public school bargaining. The association or union can not put the employer out of business. In fact,

if the school board has taken a strike over a money issue, the striking teachers are alleviating the employer's problem by saving payroll costs every day that the strike persists. This is particularly devastating to the teacher organization's cause when the school district is fiscally dependent! Obviously, in this process the employer does not have to worry about profit losses or unhappy stockholders, as is the case in the private sector. If you believe that taxpayers will automatically take the side of the strikers and support a settlement for unusually higher spending, study former Mayor Alioto's experience in San Francisco. Additionally, the community will assure and demand the continuance of a system of public education. Once we grasp this fundamental concept, the strike, or threat of strike, is no longer a viable weapon in the arsenal of the teacher's organization.

I am not naive enough to think that strikes will no longer occur in public school systems -- despite their illegality in all states but Hawaii and Pennsylvania. I merely say that they shouldn't work if we approach the problem cooly and intelligently.

If we assume that the strike is neither a desirable nor viable process in bargaining in public education, we would be naive indeed to expect that collective bargaining will always bring easily achieved, amicable settlements. Desirable and tempting as it may sound, it would probably breed chaos to have both anti-impasse procedure and anti-strike statutes. This would mean that if a school board and a teachers' organization could not reach a settlement the school would act unilaterally without third-party intervention of any type. In my judgment, agreements would occur only in the case of an unusually docile teacher group or a

recklessly benevolent board. Otherwise, when the Board acted unilaterally, teacher morale would plunge and the resulting attacks on the Board would cause horrendous public relations problems.

An impasse procedure, on the other hand, at least provides a cooling off period and a ventilating process. The teachers' organization can often placate its more militant members by declaring: "We took them to impasse." Then they can blame a settlement which bears no resemblance to their demands on "that" neutral. A school board maintains creditability with its teachers, the press, and the public through a willingness to permit a neutral to participate in the process.

Now we come to the crux of the matter -- to what degree should power be given to the third party -- the neutral -- in an impasse. My answer is: VERY LITTLE.

This means that, in my judgment, mediation is the best method of settling impasses in the collective bargaining procedure in public education. (I make no distinction between the terms "mediation" and "conciliation.") In the mediation process, the neutral is limited to the power of persuasion. He meets with both negotiating teams and permits them to present their "sides of the story" of the impasse to date. Then he meets with each side separately to determine how much movement is left to gain a settlement. He suggests, he pushes, he coaxes, he invents alternatives, and, if he is skilled, he is usually successful in causing an agreement to be reached.

In my state -- Maryland -- mediation is required by law if an impasse occurs, and if the mediator is unsuccessful, he is required to produce "recommendations" in writing. This is basically a fact-finding process and provides complete public ventilation of the dispute. The resulting

recommendations are just that -- advisory. The teachers' organization may reject the report and decide not to have a collective bargaining agreement. The school board may reject the recommendations and enact a program unilaterally. Actually, there is great pressure on both the teachers' organization and the school board to accept a fact-finding report. To do otherwise, the teacher organization runs the risk of appearing ineffective in the eyes of its members when the school system continues to operate successfully and smoothly without a collective bargaining agreement. The school board can incur public wrath if it acts unilaterally in rejecting a fact-finding report which the public (with the help of the press) deems to be reasonable and logical.

Fact-finding, in my opinion, should be the ultimate step in an impasse procedure, although I realize this can result in deep frustrations when a collective bargaining agreement does not result. To those who criticize the fact-finding process as ineffective from the perspective of teachers' organizations and ask for something more, namely binding interest arbitration, I believe the public ventilation afforded by this process should be compared to pre-bargaining days when teachers' organizations had only presentation rights before school boards. To the critic who says the process ending with fact-finding is incomplete, I say in the words of a popular advertisement: "You've come a long way baby!"

Many leaders of teachers' organizations advocate binding interest arbitration as the ultimate step in the collective bargaining process. (It is important to distinguish between binding arbitration as the final step in an employees' grievance procedure and binding interest arbitration in an impasse procedure. In the case of a grievance procedure, the arbitrator is

limited to determining whether school officials properly administered the provisions of a collective bargaining agreement. A properly drawn binding arbitration provision of a grievance procedure should specify clearly that the arbitrator has no authority to add to, alter, detract from, amend or modify any provision of the collective bargaining agreement, or to make any award which will in any way deprive the school board of any of the powers delegated to it by law. By nature binding interest arbitration transfers from a school board to an arbitrator the ultimate power to establish basic policies which fall within the scope of collective bargaining. In many school systems, this is a broad scope indeed which impacts upon instructional matters as well as personnel considerations.)

Actually, binding interest arbitration is counter-productive to the process of collective bargaining. George Meany, President of the AFL-CIO, stated at the 1975 convention of big labor: "I hope I never see the day that the AFL-CIO will ask Congress to impose compulsory arbitration on anybody anywhere at any time."

If a state legislature is short-sighted enough to enact a binding interest arbitration statute, or if a school board is foolish enough to add this feature to an impasse procedure in absence of a statute, a journey through binding arbitration would become a predictable part of the process in each bargaining session. Why should a teachers' organization settle during the regular negotiating session if it can hope to wring out a few more concessions in the binding arbitration process? Why not have two bites of the apple? Some proponents of binding interest arbitration will compromise for a "final best offer" system where the union takes little risk and the school board plays Russian roulette.

Proponents of binding interest arbitration will usually compromise quickly by saying: "At least let us have arbitration of unresolved non-fiscal matters." In my judgment, binding arbitration in the negotiation of non-fiscal matters is more dangerous than applying the process to fiscal proposals. Usually there is a fiscal check on both fiscally dependent and independent school boards if an incompetent arbitrator runs wild. On the other hand, for example, bad awards applying seniority to personnel policies or insinuating the collective bargaining process into curriculum matters could seriously affect the quality of education in a school district.

As much as I oppose the right of school employees to strike, given the choice between a "binding interest arbitration" statute and a "pro-strike" statute, I would not hesitate a second in favoring the strike statute. On a rating scale of 10, with 0 being terrible, 5 representing disaster, and 10 meaning catastrophe, I would make "strike" a 5 and "binding interest arbitration" a 10!

Neal R. Peirce, contributing editor of the National Journal in Washington, in an article published in the Baltimore Sun, stated: "The jurisdictions that have tried to avoid strikes by adopting compulsory arbitration have had reason to regret their choice.... Arbitrators tend to come half-way between the union and employer."

Finally, and at the risk of appearing to open up a whole new subject, this topic must be considered in light of the rush to enact "sunshine" laws. Both management and union negotiators have traditionally held the view that collective bargaining will not work unless absolute secrecy is practiced. It is time to re-examine the implications of "goldfish bowl" bargaining; such a process is in effect by law in a few states and may be heading your way!

Mr. Peirce quotes Henry L. Browne, a veteran management negotiator

in Kansas City, Missouri, as reacting to "goldfish" bargaining as follows: "The negotiations, being in the public eye, imposed a sense of responsibility on the parties in negotiating a contract. Both sides felt their positions had to be reasonable ones, because if they weren't, the reaction by the public might be unfavorable."

It is inevitable that the public will become more involved in the collective bargaining process -- including impasse resolution. This is how it should be, in my opinion, as the future direction of public education will be deeply affected by how we handle the process of collective bargaining. In looking upon collective bargaining in public education in general, and impasse resolution, in particular, we should not be bound or thwarted by past notions, axioms, or doctrines. Considerable room exists for improving the process as we keep our eyes on our major goal -- striving for excellence in educating our students.